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# FETAL JURISPRUDENCE—A DEBATE IN THE ABSTRACT

ROBERT J. ARAUJO

## A SUBWAY CAR NAMED INQUIRE

Call it fate. Call it luck. Call it the will of God. Call it what you wish. Allow me to explain. The United States Supreme Court is about to hear oral argument on a case which may well address once and for all the issues of abortion.<sup>1</sup> The status of cases such as *Roe v. Wade*,<sup>2</sup> *Doe v. Bolton*,<sup>3</sup> and *Webster v. Reproductive Health Services*<sup>4</sup> is now uncertain.

On the day of the argument, two lawyers of national prominence involved with this case have coincidentally arrived at Washington, D.C.'s National Airport at the same time. One is Thelma Aquino; she represents an amicus curiae, The National Anti-Abortion Committee. The other is Jarvis Tomkins; he represents another amicus curiae, The American Abortion Alliance. Both counsel decide that it would be convenient to take the Metro (the Washington subway) to the Supreme Court. Unbeknownst to them, they simultaneously arrive at the subway station and enter the same car.

Since they are both absorbed in the notes they have prepared for oral argument, neither sees that they are sitting opposite one another. As the subway glides out of the airport station, the subway lights flicker, but none of the passengers give this much attention. When the train halts at the Pentagon Station, a large number of passengers disembark. As a result, both Aquino and Tomkins see one another. They have met before.

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<sup>1</sup> Abortion has been a political issue since the 1960s, when proponents of abortion reform were challenging long standing state laws that dated back to the 19th century. R. TATALOVICH & B. DAYNES, *POLITICS OF ABORTION* 1 (1981).

<sup>2</sup> 410 U.S. 113 (1973).

<sup>3</sup> 410 U.S. 179 (1973).

<sup>4</sup> 109 S. Ct. 3040 (1989).

Each acknowledges the other by politely smiling and nodding, but no words are exchanged.

As the train whisks away from this station, the lights in the cars flicker more erratically and then begin to dim. The problem with the lighting is so noticeable that most passengers fail to recognize that the train is slowing down as it is about to pass under the Potomac River. Then, without warning, the train abruptly halts and the lights go out. Although there is no panic, a number of passengers verbally express some mild concern.

A brief moment later, the emergency lighting is activated. The subway engineer announces over the public address system that there has been a minor malfunction with a switch. As a result, the train will have to remain stationary until a qualified mechanic can get to the nearest station and then walk through the tunnel to the disabled train. With apologies, the conductor attempts to quell the anxieties of the passengers by stating that they should be on their way within a "short" time. A paleontologist on her way to work at the Smithsonian Institute wryly smiles to herself when she hears these words: "Compared with other epochs, the ice age is also considered a short time," she thinks to herself.

Since the morning rush hour continues and the oral arguments on the abortion case are not scheduled until the afternoon session, neither Tomkins nor Aquino are particularly concerned about the delay. Both had planned to work at the court library for the balance of the morning. As the lighting conditions are not conducive to work, both counsel briefly exchange pleasantries. In the meantime, the engineer's voice once again is heard over the speakers: "Metro officials believe they have identified the source of our mechanical failure and hope to have it corrected within the next hour or two. We hope this delay will not inconvenience you in any substantial way, and we hope to see you again real soon on Metro. Have a nice day!"

Have a nice day! Passengers fantasize about vengeance, consider the consequences of being late for work, or simply contemplate their fate being stranded several hundred feet underground. Have a nice day, indeed!

Since it is impossible to work without sufficient lighting, both counsel begin a conversation about the case and the issues. Neither is reluctant to discuss the case with the other. Besides, the briefs which have already been submitted to the Court and exchanged with the parties and other amici, pretty much detail their respective arguments and supporting rationales. Their conversation goes something like this:

"Well, do you think the Court will raise any questions about past decisions, particularly *Webster*?" asks Tomkins.

"Could be," replies Aquino noncommittally. "I suppose that some of

Justice Stevens<sup>5</sup> discussion in his concurring and dissenting opinion could come up again."

"Anything in particular?" inquires Tomkins.

"Well, yes. It should come as no surprise to you that my clients take the view that Justice Stevens incorrectly applied a first amendment test in *Webster*.<sup>6</sup> He seems to equate the natural law doctrine that it is impermissible to terminate the existence of a fetus through an abortion with certain religious doctrines.<sup>7</sup> As you can see from my brief, Justice Stevens misunderstands the point: there is clearly a secular basis supporting most statutes which hold that a fetus's life should not be terminated by abortion."<sup>8</sup>

"Yes, yes, I read your brief and I must say I found your argument, ah, interesting. But you really don't think the Court will accept your reasoning, do you?"

"Since we apparently have some time before this train will operate and our trip will resume, I'll see if I can convince you of my point. Let me begin by positing that there is a secular natural law argument supporting anti-abortion legislation and regulation. Although this argument may draw from the moral beliefs that are held and fostered by individuals holding certain religious beliefs, these moral beliefs do not promote religious beliefs in any way that would violate the establishment clause of the

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<sup>5</sup> *Id.* at 3079-85 (Stevens, J., concurring in part, dissenting in part).

<sup>6</sup> *See id.* at 3082-83 (Stevens, J., concurring in part, dissenting in part). Justice Stevens concluded that the Missouri statute involved in *Webster* did not have a secular purpose because it declared that life begins at conception. *Id.* (Stevens, J., concurring in part, dissenting in part). He opined that the statute's declaration coincides with certain tenets of the Roman Catholic Church's view on natural law rights concerning human life as articulated by St. Thomas Aquinas. *Id.* (Stevens, J., concurring in part, dissenting in part). Because of this coincidence, the Justice concluded that this portion of the statute is an indirect endorsement of the tenets of a particular religion. Such endorsement violates the establishment clause. *Id.* (Stevens, J., concurring in part, dissenting in part); *see also infra* note 8 (discussing relation among lawmaking, religious convictions, and establishment clause).

<sup>7</sup> *Id.* at 3083 (Stevens, J., concurring in part, dissenting in part). Justice Stevens labeled the preamble "an unequivocal endorsement of a religious tenet." *Id.* (Stevens, J., concurring part, dissenting in part).

<sup>8</sup> Professor Kent Greenawalt has thoughtfully examined the relationship between lawmaking, religious convictions, and the establishment clause of the first amendment. *See Greenawalt, Religious Convictions and Lawmaking*, 84 MICH. L. REV. 352 (1985). My discussion will periodically refer to the insights Professor Greenawalt has made concerning this relationship. A central thesis advanced by Greenawalt is that legislation, and presumably the development of any enforceable public policy, must be justified by secular objectives. *Id.* at 357. However, it is permissible to rely on religious convictions to help answer basic questions of value that cannot be completely addressed by secular rational decision making. *Id.* As long as the policy's goals can be justified on secular grounds, reliance on religious convictions to mold decision making does not violate the establishment clause. *Id.*

first amendment.<sup>9</sup> These moral beliefs, moreover, are, as I shall demonstrate in a few moments, justified by secular objectives.<sup>10</sup>

Secondly, there is a secular-based argument against the claim of your client and other pro-abortion advocates that a woman has a fundamental constitutional right<sup>11</sup> to terminate any pregnancy. This second argument establishes a foundation for the philosophical inquiry which I call fetal jurisprudence."

"I am anxious to hear your arguments, counselor," Tomkins challenged.

#### THE ESTABLISHMENT CLAUSE ISSUE IS ELIMINATED

"All right. First of all, I think it important to recognize and understand the fallacy that a statute which happens to reflect or parallel some religious tenet automatically runs afoul of the establishment clause.<sup>12</sup> If my reasoning is sound and this position is accepted by the Supreme Court, many statutes, rules, and regulations enacted by secular public bodies which contain provisions that aim at goals shared by religious beliefs but which do not promote the religious beliefs themselves should not be suspected of violating the establishment clause.

Take, for example, the claim that no intermediary can interfere with the feminist position that a woman has a fundamental right to terminate a pregnancy.<sup>13</sup> If we borrowed from Justice Stevens' reasoning, I could suggest that this feminist principle also violates the establishment clause because it reflects certain Calvinist tenets.<sup>14</sup> Similarly, government interference with the sale of certain foods and beverages arguably duplicate dietary laws observed by Jews and Moslems.<sup>15</sup> I am convinced that where

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<sup>9</sup> U.S. CONST. AMEND. I. The relevant text of the first amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." *Id.*

<sup>10</sup> Greenawalt, *supra* note 8, at 357.

<sup>11</sup> *Webster*, 109 S. Ct. at 3067 (Blackmun, J., concurring in part, dissenting in part).

<sup>12</sup> *Id.* at 3082 (Stevens, J., concurring in part, dissenting in part). Justice Stevens admitted that laws can coincide with tenets of certain religions without violating the establishment clause. *Id.* (Stevens, J., concurring in part, dissenting in part).

<sup>13</sup> See *People v. Belous*, 71 Cal. 2d 954, 458 P.2d 194, 199, 80 Cal. Rptr. 354, 359, *cert. denied*, 397 U.S. 915 (1970); N. DOWNS, *FROM CRIME TO CHOICE* 5 (1985).

<sup>14</sup> See generally 1 J. CALVIN, *INSTITUTES OF THE CHRISTIAN RELIGION* bk. III, ch. I, see IV (J. Allen trans. 1949) (1559) (Calvinist belief that there can be no human intermediary between God and individuals parallels feminist view).

<sup>15</sup> The point which I am making is that public authorities enact rules regulating the conduct of people for secular reasons at the same time that religious rules enacted by sectarian authority may also regulate the same or similar conduct. For example, secular authorities may prohibit the sale and consumption of shellfish which is contaminated by Red Tide or mercury poisoning. See, e.g., *Deuteronomy* 14:9-10 (shellfish consumption prohibited for religious reasons); *Leviticus* 11:10-12 (same). Civil authorities might also regulate the con-

state and federal statutes have independent secular bases for their existence, they should be free of the snare of the establishment clause prohibition.<sup>16</sup>

"In the case of a statute regulating abortion on the grounds of protecting fetal life, this regulation should simply be free of the first amendment prohibition where there is a secular foundation supporting the rule, even though the rule might parallel certain religious beliefs.<sup>17</sup> The fact that the rule reflects, without implementing or enforcing, some religious tenet is immaterial so long as the rule is independently justifiable on secular grounds and serves civil objectives.<sup>18</sup>

It is also crucial, as we examine the abortion issue, to identify and compare the respective rights of pregnant women and fetuses. We must keep in focus the actual definition of the rights actually specified by *Roe* and its progeny. The right to an abortion, as defined by *Roe*, is neither absolute<sup>19</sup> nor unqualified.<sup>20</sup> Just as the right conferred by *Roe* is secular in nature, so is the foundation for prohibiting abortion.

"I would now like to identify first of all what is the secular natural law theory underlying my client's position, and, then, second, demonstrate that it establishes that the fetus<sup>21</sup> also has constitutionally protected rights. This second facet of the argument regarding fetal rights will illustrate that the fetus is a human entity. As a human entity, the fetus shares with all other human entities a place in the chain of human development and is arguably entitled to protection under the fourteenth

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sumption of certain foods and alcoholic beverages which would parallel prohibitions of Moslem dietary laws. See, e.g., THE KORAN, Suras "The Table", "The Cow" (certain meats and "strong" drink prohibited). In these examples, the civil authorities have enacted the prohibitions to accomplish secular objectives; nonetheless, the civil prohibitions accomplish the same results (i.e., abstinence from certain foods, etc.), albeit for different purposes, as the religious laws. The civil prohibitions would run afoul of the establishment clause if they were enacted to enforce sectarian beliefs. They do not violate the first amendment prohibition, however, if their goal is to protect people from contaminated foods or to prevent minors from consuming alcoholic beverages.

<sup>16</sup> Greenawalt, *supra* note 8, at 361, 392, 402.

<sup>17</sup> *Id.* at 380.

<sup>18</sup> *Id.* at 380, 402.

<sup>19</sup> *Roe v. Wade*, 410 U.S. 113, 153 (1973).

<sup>20</sup> *Id.* at 154-56; see *Doe v. Bolton* 410 U.S. 179, 208 (1973) (Burger, C.J., concurring). It is important to realize that the abortion rights established by *Roe* are conferred to the consulting physician, not to the woman herself. *Roe*, 410 U.S. at 163-66. Under the language of *Roe*, it seems that the woman does not have a right to an abortion unless her physician determines, in the physician's professional medical judgment, that the pregnancy should be terminated. See *id.*

<sup>21</sup> While medical science distinguishes between different stages of in utero human development (zygote, embryo, fetus), I shall refer to all stages as belonging to fetal development. Consequently, I shall use the term "fetus" where medical science might use zygote or embryo.

amendment, or at least is protected within the penumbra of fourteenth amendment protections."<sup>22</sup>

### THE NATURAL LAW BACKGROUND

"Most understandings of natural law, including my own, begin with some concept about law itself. Regardless of whether one subscribes to positive<sup>23</sup> or natural<sup>24</sup> theories of law, would you agree that law is fundamentally recognized and accepted as a means by which human conduct is in some form or other regulated or subject to regulation?"<sup>25</sup>

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<sup>22</sup> See *Roe*, 410 U.S. at 156-57. In *Roe*, the majority held that "[i]f this suggestion of personhood is established, the appellants case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment. The appellant conceded as much on reargument. *Id.* (footnote omitted). Professor Donald H. Regan reaches a different conclusion. While he states that even if the fetus is considered to be a person under the fourteenth amendment (which he concludes it is not), it would not necessarily follow that the Constitution forbids abortion. Regan, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 1569, 1641 (1979). Professor Regan further stated that: "The Fourteenth Amendment does not say that the fetus is a person, but neither does [it] . . . say that a state may not decide to regard the fetus as a person, if the state so chooses." *Id.*

<sup>23</sup> Deryck Beyleveld and Roger Brownsword define positive law by contrasting it with natural law. They state that "Positivists, . . . like natural lawyers, are interested both in the law-as-it-is and in the law-as-it-ought-to-be. They insist, however, that an objective science of law requires that the law-as-it-is be defined and thereby identified in a morally neutral fashion." Beyleveld & Brownsword, *The Practical Difference Between Natural-Law Legal Theory and Legal Positivism*, 5 OXFORD J. L. STUD. 1, 3 (1984). Plato makes a contribution to understanding legal positivism when Thrasymachos identifies justice (and the law it presumably implements) as being the exercise of power, i.e., authority and the enforcement of its dictates through coercion (or the threat of coercion) are law. PLATO, *THE REPUBLIC*, bk. I, 337a-339a.

<sup>24</sup> Professor John Finnis, in his "bald assertion" of natural law defines it as: (1) a set of basic practical principals which indicate the basic forms of human flourishing as goods to be pursued and realized; (2) a set of basic methodological requirements of practical reasonableness which distinguish sound from unsound practical thinking; and, (3) a set of general moral standards. J. FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 23 (1980). Professor Kent Greenawalt defines traditional natural law as "the longstanding position in moral and legal theory that human law is in some sense derived from moral norms that are universally valid and discoverable by reasoning about human nature or true human goods." K. GREENAWALT, *CONFLICTS OF LAW AND MORALITY* 161 (1989). Professor A.P. d'Entreves sees natural law as "man's quest for an absolute standard of justice. . . [that is] based upon a particular conception of the relationship between the ideal and the real . . . between what is and what ought to be." A. P. D'ENTREVES, *NATURAL LAW* 93 (1970).

<sup>25</sup> Professor Finnis sees law as a straightforward application of universally valid requirements of reasonableness that are, in turn, related to goals designed to achieve human goods. J. FINNIS, *supra* note 24, at 289. He also views law as ideally being guided by moral principles. *Id.* at 290. Professor Ronald Dworkin takes a somewhat different approach. He sees law as an:

interpretive, self-reflective attitude addressed to politics in the broadest sense . . . Law's attitude is constructive: it aims, in the interpretive spirit, to lay

"Yes, I would generally agree with that understanding."

"In essence, then, law is a rule, or rules, established by an acknowledged authority which has power to enforce those rules. There are common views about law shared by both positivists and natural lawyers. For a positivist such as H.L.A. Hart, law declares that certain kinds of human conduct are obligatory.<sup>26</sup> For many natural lawyers, such as Thomas Aquinas, law, too, is a rule or rules which govern human acts.<sup>27</sup>

"The distinction between these two schools or approaches to understanding law might be summarized as follows: the positivists see the law-as-it-is, whereas the natural lawyers view the law-as-it-ought-to-be.<sup>28</sup> It is the naturalist who also introduces into the law the concept of morality-being-consistent-with-the-law.<sup>29</sup>

"Some critics of natural law may suggest that there is an internal conflict or inconsistency in natural law. They incorrectly assume all natural lawyers as saying that since human law is derived from some natural law or natural principles, human law cannot be immoral. I do not think that all natural lawyers assert that every law generated by human beings is always moral or that it prohibits or encourages everything prohibited or encouraged by natural law. Thomas Aquinas certainly acknowledged that the laws which humans generate through their socio-legal institutions do not always prohibit all things proscribed by natural law.<sup>30</sup> He acknowledged that the laws enacted by human authorities are not always just; in fact, they can be and sometimes are unjust.<sup>31</sup> This view of Aquinas is

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principle over practice to show the best route to a better future, keeping the right faith with the past. It is, finally, a fraternal attitude, an expression of how we are united in community though divided in project, interest, and conviction.

R. DWORKIN, *LAW'S EMPIRE* 413 (1986).

<sup>26</sup> H.L.A. HART, *THE CONCEPT OF LAW* 79 (1961). Professor Hart ultimately concludes that law is a union of two types of rules, primary [impose duties] and secondary [confer powers]. *Id.*

<sup>27</sup> Aquinas elaborated on his definition, as does Hart. For Aquinas, law is also conceived by reason and promulgated with a view toward the common good. 1 T. AQUINAS, *SUMMA THEOLOGICA* pt. I-II, question 90, art. 4 (Fathers of the English Dominican Province trans. 1947). However, his simplest definition of law parallels Hart's: "[L]aw is a rule and measure of acts, whereby man is induced to act or is restrained from acting." *Id.* at art. 1.

<sup>28</sup> Beyleveld & Brownsword, *supra* note 23, at 3.

<sup>29</sup> *Id.* Professor Dworkin takes a different view, but he still sees law and morality as being mutually supportive of one another. The judicial process of deciding the more difficult cases which arise within the law cannot escape a spirit of integrity which influences and permeates judicial interpretation. For Dworkin, judicial interpretation seeks the best decision based on political morality. R. DWORKIN, *supra* note 25, at 248, 258, 263.

<sup>30</sup> T. AQUINAS, *supra* note 27, at question 96, art. 2. Specifically, Aquinas stated that: "The natural law is a participation in us of the eternal law: while human law falls short of the eternal law. . . [H]uman law does not prohibit everything that is forbidden by natural law." *Id.*

<sup>31</sup> *Id.* at art. 4. "Laws framed by man are either just or unjust. If they are just, they have



echoed by contemporary natural law advocates."<sup>32</sup>

"But, more precisely, what is natural law?"

"I thought you'd never ask," joked Tomkins.

### THE HISTORICAL CONCEPT OF NATURAL LAW

"As you know, Jarvis, I have a lot of respect for the contribution Aquinas has made to the evolution of legal concepts. The fact that much of his work may be reflected in some of the religious doctrines of the Roman Catholic Church does not minimize the contribution he has made to the evolution of secular legal principles."<sup>33</sup>

"An important element of natural law which applies to the abortion question, and upon which I shall elaborate more fully later, is that natural law leads people to perform in ways that are consistent with the final end of humankind."<sup>34</sup>

"A fundamental precept of natural law related to the end of human-

the power of binding in conscience. . . . On the other hand, laws may be unjust . . . by being contrary to human good. . . ." *Id.*

<sup>32</sup> John Finnis disputes Hart's contention that moral concepts of law such as natural law "[d]en[y] legal validity to iniquitous rules. . . ." H.L.A. HART, *supra* note 26, at 207. Finnis, like Aquinas, advances the notion that the natural law tradition accords validity to iniquitous legal rules: "[W]hether on the ground and in the sense that these rules are accepted in the courts as guides to judicial decision, or on the ground and in the sense that, in the judgment of the speaker, they satisfy the criteria of validity laid down by constitutional or other legal rules, or on both these grounds and in both these senses." J. FINNIS, *supra* note 24, at 365.

<sup>33</sup> *Cf.* Greenawalt, *supra* note 8, at 370-71, 396.

<sup>34</sup> For Aquinas, this was happiness (knowing God) and contemplation of truth (which includes serving those who contemplate truth). See T. AQUINAS, *SUMMA CONTRA GENTILES*, chs. XXV, XXXVII. This view about the end of mankind parallels, in part, Aristotle's concept of eudaimonia. ARISTOTLE, *NICHOMACHEAN ETHICS*, bk. I, ch. 7, 1097b. For Aristotle, happiness is the final end which consists of the happy person attaining virtue. *Id.* ch. 10, 1100b. This happiness is not really focused on satisfying ourselves but is, rather, focused on satisfying our neighbors. *Id.* bk. IX, ch. 9, 1170a. John Finnis has adopted some of Aristotle's concept of happiness-as-other-centeredness by including other-directedness along with duty and equality in his natural law concept of justice. J. FINNIS, *supra* note 24, at 160, 164. Professor Mary Ann Glendon, echoes the sentiment of other-directedness. She distinguishes between what she identifies as a central theme of being an American (the over-emphasis of individual liberty) and that of being a Canadian (the duty of being a good neighbor). She uses this theme to illustrate how, among the Western democracies, it seems that only Americans hold that there is an absolute right for a woman to have an abortion. By contrast, she says that the general sentiment of other citizens of the Western world is to pay more attention to the duties each person has to others rather than to one's self. Address by Mary A. Glendon on "The Structure of Freedom: Correlations, Causes and Cautions" at Boston College (Oct. 29-30, 1987). Finally, Professor Dworkin, in his assessment of what the good in legal and political institutions should be, suggests that, along with other elements, the law is a fraternal attitude, an "[e]xpression of how we are united in community though divided in project, interest, and conviction." R. DWORKIN, *supra* note 25, at 413.

kind is: do good and avoid evil.<sup>35</sup> The doing of good, (and the correlative avoidance of evil, provides for and cultivates virtuous human activities.<sup>36</sup>

"It is my ultimate position that human law should avoid evil and promote that which is good to the members of the society who are governed by such law. A good to be achieved by law is promoting human development, or flourishing. An evil to be avoided is frustrating this development. I submit that aborting a fetus is antithetical to developing human entities. Like other human entities who are more advanced in this chain of development, the fetus should also be entitled to the good which can be realized through its continued development. Restraining abortion would, at least in principle, foster the future of the human community by ensuring the existence of future generations.<sup>37</sup> These are interests which all members of society have and share with the other members, including its future members.<sup>38</sup> It would follow that human law should prohibit the evil of harming individuals which directly correlates to the end of human-kind and the common good.<sup>39</sup> Aquinas specifically includes the taking of

<sup>35</sup> 1 T. AQUINAS, *supra* note 27, at question 94, art. 22. As Aquinas states, "the first principle in the practical reason is founded in the notion of good, that *good is that which all things seek after*. Hence this is the first precept of law, *that good is to be done and ensued, and evil is to be avoided*. All other precepts of natural law are based upon this." *Id.*

<sup>36</sup> *Id.* at art. 3.

<sup>37</sup> Assuming that people desire the continuation of the human species, and acknowledge this as an end of society, protection of the fetus would seem to be an appropriate means of accomplishing this goal. Thus, people from one generation would have a duty of providing for future generations by having equal regard for future human interests as well as their own. See generally GRIFFIN, *TOWARD A SUBSTANTIVE THEORY OF RIGHTS, UTILITY AND RIGHTS* (Frey ed. 1984). As I mention in the main text, this is an argument in principle. Given the high birth rate in some countries, the density of population in certain areas, and the general increase in the world's population, it would not be plausible to suggest that abortion would, at this time, threaten the continuation of the species.

<sup>38</sup> Greenawalt, *supra* note 8, at 380. Professor Greenawalt suggests that protection of life, including that of fetuses, may be vital to the shared interests of the human community. He further opines that restriction on abortion "may be thought to protect life, the most obvious and vital interest that members of the community have." *Id.*

<sup>39</sup> The idea of the common good contains elements of mutuality and reciprocity, i.e., one individual treating another person as the first would want to be treated. It is difficult to imagine that anyone alive today would take kindly to his or her own prenatal existence being terminated by an abortion. By extending this concept of the common good as a mutuality or reciprocity of treatment, it is also difficult to see how the person who would probably not have wanted his or her own fetus aborted can then turn around and argue that some other fetus (and future person) can be aborted without interference or restriction. See K. GREENAWALT, *supra* note 24, at 162. Mutuality and reciprocity suggest that the common good is essential to the preservation of the human community, both its current and future membership. Yet, as Alasdair MacIntyre has indicated, the idea of society and "the political community as a common project is alien to the modern liberal individualist world." A. MACINTYRE, *AFTER VIRTUE* 156 (1981). John Finnis has raised similar concerns about the importance of the common good. He sees a social as well as an individual facet to the com-

human life as such an evil that the law is designed to avoid.<sup>40</sup>

"I submit that abortion is an evil that contravenes natural law because termination of fetal development interferes with the end of humankind, including the maintenance of the species. Before I look at the status of the fetus within the context of secular natural law and the end of humankind, let me first make a contrast between a positivist legal system (the law is valid) and a natural law system (the law is moral). I shall then use this contrast to develop the essential elements of my client's contemporary, secular theory of natural law."

#### TWO LEGAL SYSTEMS: POSITIVIST AND NATURAL

"There are several points which are essential to the notion of law regardless of the culture, society, or political institutions which then host and sponsor a given legal system. I agree with the point shared by Aquinas and John Finnis that a system containing unjust laws can still be a legal system in which rules are promulgated and enforced by a recognized authority. The fact that an unjust system is legal in the sense that rules are developed and enforced by some acknowledged authority does not necessarily make the body of law desirable, correct, or unchangeable.<sup>41</sup> Still, the system makes and enforces rules, some of which are, or may be, unjust.

"The fact that an unjust body of law exists within a given legal system does not necessarily make that system one which furthers the end of humankind, the development of human beings and the potential which they as individual beings can achieve. For example, think of the legal systems of Nazi Germany, South Africa, or the Occupied Territories. Clearly, in each of these cases, there is a body of rules established and enforced by an acknowledged, though not necessarily 'legitimate,'<sup>42</sup> authority which

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mon good: "each and everyone's well-being, in each of its basic aspects, must be considered and favoured at *all* times by those responsible for co-ordinating the common life." J. FINNIS, *supra* note 24, at 214. He further states that "the common good is the good of individuals, living together and depending upon one another in ways that favour the well-being of each." *Id.* at 305.

<sup>40</sup> 1 T. AQUINAS, *supra* note 27, question 96, art. 2. This section of Aquinas' work states in pertinent part that "human laws do not forbid all vices from which the virtuous abstain but only the more grievous vices from which it is possible for the majority to abstain . . . without the prohibition of which *human society could not be maintained.*" *Id.* (emphasis added).

<sup>41</sup> For an interesting discussion of whether a legal order which promulgates and enforces rules of law is to be respected by a succeeding legal order, see L. FULLER, *THE MORALITY OF LAW* 187-95 (1964).

<sup>42</sup> In his writing, Professor Fuller examines, through the use of a hypothetical regime which parallels aspects of Nazi Germany, whether laws enacted by an unjust regime must be enforced by a successor state. L. FULLER, *supra* note 41, at 187-95.

has at its disposal means of enforcing the rules against individuals as well as groups of people subject to the rules.<sup>43</sup> A system of natural law transcends the limitations of a valid legal system which produces and enforces unjust laws. A legal system developed by natural law goes beyond mere validity. It is geared to achieve a desirable end, or at least a better state of existence for all the individuals who are the subjects of the community governed by the legal system.<sup>44</sup>

"By contrast, it cannot be said that Jews subject to the law of Nazi Germany, black Africans subject to the rules of South Africa, or Palestinian Arabs subject to the authority of the occupying forces in the West Bank and the Gaza Strip are governed by a legal system which is designed to attain some better and desirable condition. The Jews were, and the black South Africans and Palestinians are, governed by the law-as-it-is, not the law-as-it-ought-to-be. The positivist law-as-it-is promises neither human fulfillment nor rose gardens; it simply provides valid, although sometimes unjust, rules which are to be followed. If they are not, the acknowledged authority can, and often does, take repressive measures of coercion. By contrast, natural law principles seem better suited to offer individuals greater opportunity for human flourishing.

"The concept of natural law developed by John Finnis provides a useful scheme for understanding the concept of the law-as-it-ought-to-be relied upon by my client."

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<sup>43</sup> We do not have to rely exclusively on Professor Fuller's hypothetical state of the Purple Shirts to examine whether specific laws enacted by an acknowledged authority may be disregarded for moral reasons. For example, the decision in *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857), raises grave secular concerns about how one group of people was allowed by valid legal authority to enslave another group of people. Recall the words of Chief Justice Taney: "[T]hey [the African American people] were at that time considered as a *subordinate and inferior class of beings* . . . and had no rights or privileges but such as those who held the power and the Government might choose to grant them." *Id.* at 404-05 (emphasis added).

<sup>44</sup> See *supra* note 24 and accompanying text; see also, K. GREENAWALT, *supra* note 24, at 17-18; R. DWORKIN, *supra* note 25, at 412-13. While his view seems to be a more pragmatic one influenced by legal realism, Professor Fuller acknowledges what he calls the inner morality of law: an aspiration rather than a duty of law. L. FULLER, *supra* note 41, at 41-44. Yet even through his realistic perspective, Fuller states that the

one central indisputable principle of . . . substantive natural law [is to] . . . [o]pen up, maintain, and preserve the integrity of the channels of communication by which men convey to one another what they perceive, feel, and desire . . . [a]nd if men will listen, that voice, [of the morality of aspiration], unlike that from the morality of duty, can be heard across the boundaries and through the barriers that now separate men from one another.

*Id.* at 186.

## A SECULAR NATURAL LAW SYSTEM

"A secular natural law theory can be extracted from the concept developed by John Finnis.<sup>45</sup> Within a secular based theory, there might exist a set of basic, practical principles which define or determine the essential forms of human flourishing.<sup>46</sup> The forms of human flourishing are basic goods or ends to be pursued and achieved. In some ways they relate and lead to the goals of humankind. Second, there is a method of practical reasonableness, itself an element which will be identified as a basic good,<sup>47</sup> which enables individuals to formulate the third element of natural law: a set of general moral standards.<sup>48</sup>

"While each of these basic goods is inextricably related to Professor Finnis' concept of natural law, I want to focus on and develop one of his basic goods as it relates to my client's argument regarding the legal status of the fetus in the abortion debate. That particular basic good is life.<sup>49</sup>

<sup>45</sup> See generally J. FINNIS, *supra* note 24 at 23 (Finnis' definition of natural law).

<sup>46</sup> Human flourishing is a term used by Professor Finnis throughout his seminal work on natural law. *Id.* at 23, 67, 89, 144, 192, 195, 219-21, 378, 380, 395-96, 398. His concept of natural law implies that human flourishing consists of the basic goods which are to be pursued and realized by individuals. *Id.* at 23. He further indicates that human flourishing is not an abstraction; it is a principle of life to be applied to all human existence by all human beings regardless of age, sex, physical or mental condition. *Id.* at 195. Human flourishing thus seems to be a concept determined by each person through the exercise of his or her personal attributes and not by some universal, objective criteria. The feminist legal scholar Margaret Jane Radin has also developed a notion of human flourishing in which she identifies particular facets of human existence that cannot be "commodified" and traded or transferred. These facets of being human, e.g. the parent-child relationship, are inalienable to not only the existence but the flourishing of the individual. Radin asserts that it is inconceivable that elements of human flourishing can be reduced to market rhetoric which "foster an inferior conception of human flourishing, one that commodifies every personal attribute that might be valued by people in other people." Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1927-28 (1987).

<sup>47</sup> See J. FINNIS, *supra* note 24, at 85-90 (identifying several elements essential to individual human flourishing). In addition to practical reasonableness, the Finnis list includes: life, knowledge, play, aesthetic experience, sociability (friendship), and religion. It seems that Finnis considers this list complete in one sense; however, he recognizes that there may be ways or combinations of ways of pursuing and realizing the seven basic goods, or some combination of them. *Id.* Finnis contrasts his seven basic goods with the views of other legal philosophers. He states that H.L.A. Hart's "'natural facts and aims', or 'truisms' about human beings, concern the material and psychological conditions ('the setting') under which persons seek their various ends (and his list of universally recognized or 'indisputable' ends contains only one entry: survival)" and John Rawls' "'primary goods' (liberty, opportunity, wealth, and self-respect) . . . [that] . . . are in general necessary for the framing and the execution of a rational plan of life." *Id.* at 82-83 (footnotes omitted).

<sup>48</sup> *Id.* at 23.

<sup>49</sup> The significance which Professor Finnis attaches to the notion of life repeatedly appears in the natural law literature. See, e.g., *supra* note 34 and accompanying text. John Locke stated that "no one ought to harm another in his Life, Health, Liberty, or Possessions." J.

Finnis has his own understanding of life which he considers the first basic value and encompasses 'every aspect of the vitality (vita, life) which puts a human being in good shape for self-determination.'<sup>50</sup> I would add that there are elements of human life that make every human being desirous of prolonging a physical existence in order to achieve goals that are personally identified as being important to that specific human entity. Individual goals relate to the goals of the community, which in turn relate to the end of humankind. However, without the opportunity for every human entity to experience 'life' without some third person interfering, for example, by aborting a fetus, identifying and achieving these goals becomes an abstraction rather than a reality. In other words, without life and its continuation, other human goals become, at best, abstractions having little bearing on actual human fulfillment and flourishing.

"While I will have to elaborate on this point in a moment, I think it important right now to say that this interest in life is held by all human entities regardless of one's personal circumstances. It seems both necessary and universal to our existence as unique individual human beings that every person, regardless of individual desires, shares this interest in life with the rest of the human family.<sup>51</sup> The goal of each person would seem to coincide with the goal of every other individual. The law of nature, as I shall explain it, should reflect this mutual goal by generating, implementing and fostering rules which cultivate the entire community of individuals' personal goals."<sup>52</sup>

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LOCKE, *SECOND TREATISE OF GOVERNMENT* ch. II, §6 (P. Laslett rev. ed. 1963) (3d ed. 1698); see also *The Declaration of Independence* para. 2 (U.S. 1776) ("all . . . are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness").

<sup>50</sup> J. FINNIS, *supra* note 24, at 86. Finnis elaborates by saying that life includes bodily and cerebral development; freedom from pain; and the recognition, pursuit and realization of human purpose. *Id.*

<sup>51</sup> Some feminist scholars, such as Robin West, believe that the fetus interferes with and invades the life of women in an actual or potentially threatening way. West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 30-32 (1988). Professor Finnis takes a different view concerning the interaction between the fetus and others and the fetus's interest in human life. He argues that the fetus, like the woman bearing the fetus, has his or her own body that belongs to the fetus and not to the woman. The claim of the pro-abortion advocate that the woman can, in self-defense, terminate the pregnancy to preserve her own interests improperly and impermissibly interferes with the fetus's parallel claim of self-defense and the protection of its own future. Finnis, *The Rights and Wrongs of Abortion*, 2 PHIL. PUB. AFF. 117 (1973), reprinted in *THE PHILOSOPHY OF LAW* 148 (R. Dworkin ed. 1977).

<sup>52</sup> Professor Finnis points out that this might be the " 'common good', namely that each and everyone's well-being, in each of its basic aspects, must be considered and favoured at all times by those responsible for co-ordinating the common life." J. FINNIS, *supra* note 24, at 214.

## THE END OF HUMANKIND AND THE STATUS OF THE FETUS

"At this point, I think it would be useful to do two things: first of all, I want to show, generally, that the human fetus does have an interest in the basic good of life; and, second, that this fetal interest in life is the same as mine or yours."

"While this might be useful, I doubt that you will succeed," commented Tomkins. "I'm skeptical about your interesting thesis. You seem to be equating fetal existence with life. It seems abundantly clear to me and my client that, at best, the interest of the fetus is not in actual human life itself, but rather, is in potential human life."

"All right, Jarvis, let me begin by examining the issue of taking human life, which I shall subsequently equate with the deprivation of human existence. Putting aside particular cases of self-defense and certain types of war, would you agree with me that one person's taking the life of another is wrong?"

"Well, yes, I suppose so . . . ."

"Good. Now let us imagine the following situation: you and I and everyone else are gathered together. Each one of us has some consciousness of our individual human condition. We also have a consciousness of the general conditions of the other people with whom we are gathered."

"Well, that would be a rather remarkable occurrence, and I am not sure that could ever happen, but I'll go along with you on this point," responded Tomkins.

"All right, then. So, in other words, each and every person assembled in this place has an awareness of his or her own condition along with those of everyone else. Now, let's assume further that, through group hypnosis and the inducement of a temporary, mild amnesia, each one of us forgets our precise identities as specific individuals. We have temporarily lost consciousness of our individual identity as distinct persons. However, each one of us continues to possess the awareness of all the types of human conditions and experiences present as represented by the individual experiences of all of the people with whom we are gathered. We just don't know who actually has what particular experience and concern.<sup>53</sup>

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<sup>53</sup> This model is patterned after John Rawls' concept of justice. Rawls begins his theory with the veil of ignorance and the Original Position. Once the veil is lowered, the assembled individuals retain an awareness of distinctions of economic, political and social status; they lose their awareness, though, of who is rich, who is poor, who is powerful, who is weak. J. RAWLS, *A THEORY OF JUSTICE* 12 (1971). I will continue to rely on the Rawls example in the development of my concept of natural law and the status of the fetus in our society because it provides a useful tool for enabling people holding different positions on the abortion issue to experience, at least in the abstraction, other individuals' conditions. In other words, it is a useful means for putting ourselves in the other person's position, including that of the fetus.

"Once we temporarily lose awareness of our own position<sup>54</sup> and begin to experience the positions of others, we become more aware of the circumstances of the other people with whom we are gathered. While we lose sight of our own position, we experience a growth of consciousness resulting from an increased awareness of the conditions and positions experienced by other people. Throughout this process of evolving consciousness, we begin to ask ourselves, 'I wonder where I fit in? Am I young? Am I old? Have I just been born? Am I about to die? Am I still within my mother's womb?' These questions are not only crucial in assessing where we might stand as individuals in a society, they also make us more conscious of the levels and beings of other human existences that we have not yet known in our own lives or that we have experienced earlier but now have forgotten. A derivative of this increasing consciousness is that we can begin to appreciate more levels of human development including that of the fetus, as we imagine ourselves as a fetus developing within the womb."

"Now this is all very interesting, Thelma, but where are we going with this discussion, and what relevance does it have to the abortion issue and the status of the fetus?"

"Glad you asked. Since we have expanded our consciousness by losing a precise identification with one we can call our own, we can now better understand the sensitivities of everyone else present, including, let's say, pregnant women. Not only does our expanding consciousness make us more aware of the position of pregnant women, it also makes us more aware of the position of the fetus she carries. I am not saying that you are or I am that fetus. What I am suggesting is that you and I are conscious of the existence of the fetus in the pregnant woman's womb. Each of us can acknowledge that the fetus, like every other human entity present, has a past, present, and future in this chain of human development.

"I suggest that because of this expanding consciousness we experience, it is possible for you or me to imagine our respective selves as the fetus, as we have been able to imagine ourselves as being every other person present.

"Now let me ask you one question: would you agree with me that up to this point you have been able to imagine yourself at least as someone other than your own self?"

"Sure, I guess I might be able to see how I could be someone else in

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<sup>54</sup> By "position," I mean both the individual characteristics a human being possesses, such as sex, capabilities, disabilities, physical makeup, personal likes and dislikes, as well as age, occupation, intellectual capabilities, professional accomplishments, etc. In short, a "position" for each person is something that can and does change; it represents a person at a given point in the continuum of his or her personal human development.



that room."

"Okay. Has this experience of seeing small children, persons in their teens, young adults, middle-aged people, and older folks in any way allowed you to recall any of the stages in your own life?"

"I suppose it has."

"Good. Now let's imagine that you and I are the fetus that one of the pregnant women is carrying. Does imagining that you are now one of the fetuses remind you that, even though you may have had no actual consciousness of your own fetal development, you were at one time a fetus being carried by your mother?"

"Well, yes, but . . ."

"And can you acknowledge that each one of us gathered in this room would have had our own respective fetal experience?"

"I suppose so . . ."

"All right. Now let us make some conclusions about this amnesic experience. Would you agree with me that because of what has gone on during this experience that all who are gathered might have obtained some new insight into the conditions of all others gathered?"

"Yes."

"And would you say that this same experience has also made those present more conscious of both different conditions of life as well as different stages of human development from the earliest to the latest?"

"Ummm," Tomkins assented. "But I don't think I care for the direction in which you are leading me."

"Since we have identified that there is something common to all gathered, namely the experience of human development and its correlative life, can we also say that each of these individuals with whom we have vicariously shared experiences that there is also some goal or future to which we all aspire that we might call for the sake of our investigation, happiness?"

"So far, I think I can go along with that."

"Fine. Now would you agree that this goal I have identified as happiness is something shared by each person with whom we have exchanged experiences through the imagined group amnesia?"

"Again, I suppose so . . ."

"Now let's tie together some of these points we have agreed upon. First of all, we have both imagined ourselves in the position of everyone else, and we have agreed that everyone else has similarly participated in this exchange with the others. Second, we have seen that each person has recognized that there are elements of human existence that everyone shares, including those of development from the earliest to the latest stages of being human. Third, we have seen that inextricably related to this human evolution is the point that each member of this group has his or her own goal and that everyone similarly enjoys some unique goal that

is a sense of happiness which we might say allows each person, in that person's own way, to progress through the levels of human development in a unique way related to each person's individuality. Finally, each person recognizes the importance of preserving the health and safety of all others because, in short, it is a way of guaranteeing the health and safety of one's own self-interests.<sup>55</sup>

"Now, let me resume the examination we were pursuing a moment ago. Would you agree that it would be wrong for one person to interfere with another person's human development, as this development may lead to the achievement of that individual's goals and personal happiness?"

"Yes, generally I think that I would agree."

"Okay. You and I have put ourselves into the position of everyone else. Also, we both recognize and acknowledge that each individual has some future interest in further developing as a human being. Moreover, the community of individuals brought together in this amnesic experience has recognized that they are all united. Each has individual goals, so that it would generally be wrong for one individual to interfere with the development and achievement of goals by someone else into whose position we have placed ourselves.

"We have also placed ourselves in the position of the fetus, and, by operation of this shared experience, I suggest that you and I would not want some other individual to interfere with our future goals for which we may have not yet planned, considering our fetal state, but which we will someday experience. Both of us, Jarvis, can look back in time and admit that neither of us, as a fetus, would want some person to come along and interfere with our future by terminating the pregnancy with which our fetal state was associated. If that were to happen, our future, our goals, indeed, our happiness would have been deprived without our consent."

"Now just a minute, Thelma, I think I've been pushed into something that I don't agree with. You are saying that this fetus is a person which shares the goal of future happiness that everyone else who participated in this group amnesia has. Now I'll agree that each individual who is consciously aware of all the positions has a better sense of understanding the many experiences represented by the people in your hypothetical,

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<sup>55</sup> See J. RAWLS, *supra* note 53, at 178. An important element of Rawls' theory of justice is the notion of protecting one's own interests (self-respect) by protecting the interests of others. By each person looking after him or herself, one's interest in self-protection relates to the need to respect the same or identical interests held by all other people. *Id.* Rawls posits the maximin rule which, in part, is used to establish the alternatives which each person would find minimally acceptable by and for all others. *Id.* at 152. John Finnis suggests that the Rawlsian theory rests on "nothing more adequate than an appeal to the individual 'prudence,' in the sense of cautious self-interest." Finnis, *The Authority of Law in the Predicament of Contemporary Social Theory*, 1 NOTRE DAME J. L. ETHICS & PUB. POL. 115, 129 (1984).

but a fetus has no consciousness."

"Perhaps not at the particular moment of being a fetus. But, in our hypothetical, amnesic experience, we both found ourselves in the position of the fetus along with every other position as determined by the diversity of individuals present. And you have agreed that each one of the individuals present has shared the same experience of being a fetus at some point in his or her human evolution. I submit, then, that if a third party were to come along when you, I, or anyone else was still in the fetal stage and terminated our mother's pregnancy, that act would not only deny us of the ability to establish our goals that we saw ourselves establishing in the hypothetical but would, in reality, deprive us of our continued existence and development. This abortion, moreover, would ultimately deprive us of the happiness which each person pursues in an individual way."

"My conclusion is that because of this shared experience of human evolution and development recreated in my hypothetical, the termination of a fetus's development by another person would be wrong because it could prejudice the future development of each and every person. In essence, we all could have had our happiness and future development wrongfully deprived because we were all fetuses at one time.

"This point leads me to a further one. Since every human being has shared the experience of human development, every person who has ever walked the face of this earth could have had his or her happiness wrongfully interfered with by termination of the pregnancy with which his or her fetal state was associated.

"In summary, each and every person who has lived has survived the period of fetal development and been born into this world. It is necessary then, for each of the people born into this existence to survive fetal development. Survival of this fetal development is essential to further human development and is a universal experience shared by each and every human being; no person has been born without experiencing conception and development that began with their father's sperm fertilizing the ovum produced by their mother.

"The necessity and universality of fetal development is significant not only to our own development as individuals but to the future generations which will constitute the membership of our societies and our human race. The future of humankind is fundamentally and inextricably related to the integrity of fetal development in general and to the safe keeping of individual fetuses in particular."

"Now just one minute, Thelma. Do you mean to tell me that you are conferring upon each and every fetus some connection between potential life and the survival of the human race?" queried Tompkins.

"I think you hit the nail on the head, Jarvis! I believe that there is a case to be made that this connection not only exists but that it is also

vital to the continuation of the human race. This connection with the continuation of the species is, first of all, based on the expectation, which each one of us has that our fetal development will not be interfered with so that our own future can materialize. Second, our fetal development may, in principle, be related to the continuation of the species because if each fetus's development is threatened by termination before birth, the human species could sooner or later become extinct if no restraints are placed on the third party's ability to terminate any and all pregnancies.<sup>66</sup>

"Another way of analyzing this point is to allow each fetus to develop fully so that its gestation culminates in a live birth. Now, if each woman who bore a child could extinguish the life of that child at birth without any consequences or without any restrictions from the rest of society, it would be possible that the human race could die out. Let's take this same situation in which a person could, without any restraint by society, terminate any pregnancy, we would again have a situation in which the continuation of the human species would be threatened.

"I submit that society should be concerned with the preservation of human life because a fetus is a living, developing, human entity possessing its own unique genetic composition even though it may, for a time, be dependent on the protective and nutritive environment of the womb.<sup>67</sup> Certainly, when we look at our own western culture, we recognize that our social and political institutions have, through the development of law, been most interested in the protection of the species from individual as well as widespread extinction.<sup>68</sup>

"Now, Jarvis, let me ask you a question: would you agree with me

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<sup>66</sup> See *supra* note 37 and accompanying text.

<sup>67</sup> While stating that for the first few months a fetus is incapable of life outside of the womb, Professor Greenawalt points out that a fetus is a living and growing entity possessing its own human genetic composition. Greenawalt, *supra* note 8, at 374. A parallel view is advanced by Professor Finnis. J. FINNIS, *supra* note 51, at 151.

<sup>68</sup> Archibald Cox has addressed society's interest in prohibiting abortion and argues that society does have a compelling interest in prohibiting abortion. Cox, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT* (1976), reprinted in 2 HUM. L. REV. 15, 16 (1976). This prohibition would maintain a respect for "the paramount sanctity of human life which has always been at the centre of western civilization, not merely by guarding 'life' itself, however defined, but by safeguarding the penumbra, whether at the beginning, through some overwhelming disability of mind or body, or at death." *Id.*

Some American courts have taken action to preserve this interest in the sanctity of human life in utero. For example, the New Jersey Supreme Court ordered that a blood transfusion be administered contrary to a woman's religious beliefs in order to save the life of her unborn 32 week old fetus. *Raleigh Fitkin-Paul Morgan Memorial Hosp. v. Anderson*, 42 N.J. 421, 423-24, 201 A.2d 537, 538 cert. denied, 377 U.S. 985 (1964). More recently, the United States Court of Appeals for the Seventh Circuit has found that an employer did not discriminate by prohibiting a pregnant woman from certain types of employment if the job poses a potential risk to her unborn child. *Schmidt, Risk to Fetus Ruled as Barring Women from Jobs*, N.Y. Times, Oct. 3, 1989, at A16.

that society has an interest in protecting the newborn because it both safeguards the life of the individual infant and it helps continuation of the human race?"

"Again, I would go along with this, but I suppose you will attempt to show that the interests of the newborn are identical to those of the fetus," answered Tompkins.

#### THE TAKING OF HUMAN LIFE: HOMICIDE VERSUS SELF-DEFENSE

"Well, yes, in a moment. But first bear with me as we look at the taking of the life of the newborn. Now you have agreed that the taking of the newborn's life would be wrong. And, you further agree that society has its own interest in seeing that each newborn's life is preserved. Now let us begin by stating that, in general, our society does not permit the taking of human life after birth. However, let us also presume that society permits one individual to take the life of another under certain, fairly well described circumstances which we call self-defense. We identify the impermissible taking of a life as a homicide, and we designate the second taking which may be justifiable under a society's law as self-defense."<sup>59</sup>

"Now, Jarvis, let's see if we can identify any situations in which it would be permissible within societal norms, as defined by law, to kill another in an act of self-defense."<sup>60</sup> Let's take, for example, a situation in which one person is being attacked by another and the person being attacked has not provoked the attack nor done anything else which might justify the attacker's action. Let us also call the victim of the unprovoked attack an innocent. Now, what, if anything may the person being attacked do that would be permitted under conventional legal norms?"

"I suppose," replied Tompkins, "that the individual under attack would be permitted to use whatever force might be necessary and in proportion to the attack to repel the attack and preserve herself."

"All right, so we agree that under generally recognized norms of self-defense, the person under attack may respond with the level of force nec-

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<sup>59</sup> I will not address in this paper a third possible category of the taking of life, that involved in the context of war. Natural lawyers as well as many others have, over the centuries, debated the justification of certain types of armed conflict. Aquinas himself discussed such taking of life. 2 T. AQUINAS, *supra* note 27, at II-II, question 40. Put concisely, Aquinas' view on the taking of life during a war may be permissible if three legal requirements are met, i.e., (1) the sovereign under whom the combatants will wage war has the authority to declare and wage war; (2) there is a just cause which authorizes the combat; and (3) the combatant must be guided by the intent of achieving good and avoiding evil. *Id.* It would seem plausible to add principles about the protection of noncombatants, i.e., innocents.

<sup>60</sup> Again, Aquinas recognizes that not all life-taking is impermissible. There are situations which generally come under the norm of self-defense in which one person may, but not always, take the life of another to preserve his own. 2 T. AQUINAS, *supra* note 27, at II-II, question 64, art. 7.

essary to repel the attacker and the evil associated with the attack.<sup>61</sup>

"Another issue which can arise in the assessment of whether the taking of another's life can be condoned is generated by one person accidentally killing another. It would seem important to investigate and determine the intent of the person who kills another.<sup>62</sup> Now, intent should be carefully examined. If a person intends to strike another, but only with a soft blow which could not reasonably be expected to harm the other, yet the other suffers a serious injury that results in death, we might conclude that the death was a result of an accident in that the intent of the person striking was to administer a soft blow which could not reasonably be foreseen to cause the death of the person who received the blow. While our investigation may show that the person who struck the other was negligent in some way and may owe a duty to the victim or the victim's estate, we would most likely conclude that the resulting death was an accident. However, if the person striking the blow did so knowing that such a blow could reasonably be foreseen as fatal, then it would be difficult, if not impossible, to conclude that the death was an accident. It would be proper to conclude that the death was intentional and produced by the voluntary act of the first person.

"More generally, if a person takes action which can be reasonably foreseen as harming another person, even though the first person causing the action does not specifically intend to harm the other, the action cannot be construed as accidental if the second person is hurt. For example, if a person contaminates a carton of milk with poison and a second individual drinks the adulterated milk and subsequently dies as a result of the poison, the death is not accidental. I suggest that this death was intentional in the sense that it was reasonably foreseeable that some person would come along and drink the poisoned milk.

"Another illustrative example of what distinguishes an accident from a homicide is the following: let's say that a motorist gets in her car and drives off. Unbeknownst to her, there is a mechanical failure with the

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<sup>61</sup> The use by the victim of force proportional to the degree of force used by the attacker is consistent with the self-defense principle contained in the common law that a victim is permitted to use that degree of force reasonably necessary to avoid the foreseeable consequences of the attack. Obviously, the facts known by the victim are crucial to determine the level of force permissible that may be used in warding off and neutralizing the attack. For a rich discussion of the facts needed to be examined in determining whether a particular level of force (including deadly force) used in self-defense is justifiable, see K. Greenawalt, "Objectivity and Law: Law's Treatment of People in an Objective Way" at The Julius Rosenthal Lectures, Northwestern University Law School (March 14, 1989). The intent of the attacker, according to Professor Greenawalt, may be a relevant factor to be considered in determining what level of force may be used in self-defense.

<sup>62</sup> See T. AQUINAS, *supra* note 27, at II-II, question 64, art. 8 for Aquinas' investigation of the relationship between intent and the killing of another.

brakes. She sees a man ahead crossing the street, and she begins to apply her brakes. Now, if the brakes had been operating properly, she would have stopped the car in time. However, due to the unknown defect, she cannot stop her car and she strikes the pedestrian and kills him. Again, while the driver may have some liability based on a negligence theory, she cannot be said to have intended to kill the pedestrian. Consequently, the resulting death is more like an accident than it is a homicide.

"However, let us say that the motorist once again gets in her car. She drives away from the curb and proceeds down the street. She once again sees the pedestrian crossing ahead in front of her line of travel. This time, she does not apply the brakes. Instead she accelerates her car knowing that in all likelihood she will hit the pedestrian and that he will probably sustain serious, if not fatal, injuries. Here, there is no accident but the homicide of another person. I call this action homicide rather than an accident because the intent of the motorist was to strike the pedestrian with a force reasonably known to cause serious, and probably fatal, injury."

"Now, Thelma, this is all very interesting, but what has all this discussion got to do with your contention about some secular natural law argument against abortion? Remember, a moment ago you said that you would identify the interests shared by the fetus and the newborn."

#### SELF-DEFENSE AND SUICIDE

"Please bear with me for a few moments more. I think it useful that we understand the connection between human beings continuing their development and situations which prematurely stop that development. Let's take the example of suicide. Now, can we assume that in most cases, suicide is wrong, an evil to be avoided?"

"Generally, I would agree, Thelma. But there might be some exceptional circumstance in which suicide might be permissible."

"All right, Jarvis. Then let's examine a case in which a woman is being attacked by a male assailant. Suppose this woman, an innocent, resists the attack for as long as she can. At some point, she realizes that her attacker is stronger than herself and she has a reasonable belief that her attacker intends to rape her. Now, would it be justifiable for her to attempt suicide in order to avoid the rape? I hasten to say that this woman is desperate and she does not want to be raped by the assailant."<sup>63</sup>

"The victim is confronted with one of two undesirable situations. The circumstances are such that the only alternative to rape is to kill herself. By killing herself, she terminates her existence permanently, but

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<sup>63</sup> Rape is an evil and something that most people would attempt to avoid. The question here is may the woman justifiably avoid the rape by committing suicide?

she avoids the rape. By not killing herself, she is raped, and probably suffers physical and psychological injuries that leave a permanent mark on her, but her assailant flees and she is alive. Recognizing that neither situation is desirable by itself, can we say that by not committing suicide the victim has a future, albeit one that presents some major difficulties, whereas by committing suicide there is no future?"

"Well, sure, but what kind of future is that?"

"I guess that's my point, Jarvis. At least it is some future where a life can be healed and be put back together. If there is no life, then, there is nothing whatsoever to salvage. I submit that it is better to have a life which may need much restorative effort to bring it back to normal as opposed to no life which has no future prospect at all."<sup>64</sup>

### THE MATTER OF ABORTION

"All right, now, Jarvis. I think it time to look at how all of this discussion relates to the issue of abortion. I have developed a foundation which I trust shows that by prematurely taking the life of a human being two things are interfered with: (1) the integrity of that person's own destiny; and (2) the impact the death has on the continuation of the species. I submit that these two points correlate to the human instinct to preserve human life and to combat anything which threatens it. Now, I think we are ready to step a little further back in time and see if these same principles apply to the human life developing in the womb, the development of the fetus.

"As I have indicated earlier, it seems that your client avoids a question that is both crucial to and unavoidable in the abortion debate: how can a person who at one time was a fetus deny to a present fetus the right to the human existence we not only claim for ourselves but also labor for ourselves?"<sup>65</sup>

"Again, I ask my question, Thelma: what connection are you making between the fetus and the newborn?"

"The position to which I am leading is that the intentional termination of the development of a fetus is not only immoral and contrary to

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<sup>64</sup> Aquinas looked at the issue of suicide as an intentional act that always results in evil rather than good. 1 T. AQUINAS, *supra* note 27, at question 90, art. 5. Generally, the taking of one's own life is an evil. *Id.* Self-inflicted death contradicts the natural instinct of preserving one's own life. Aquinas did look at the possibility of whether it would be permissible for a woman to commit suicide to avoid rape. *Id.* He concluded that it would be unreasonable and against the natural instinct of self-preservation; it would be using a greater evil (death) to avoid a lesser evil (rape). *Id.*

<sup>65</sup> Alasdair MacIntyre has raised the issue of the morality of abortion by asking "how can I consistently deny to others the right to life that I claim for myself?" A. MACINTYRE, *supra* note 39, at 7.



natural law, but is also a principle so important to the secular interests of our society that abortion should be considered impermissible and unlawful. The fetus, like a newborn baby, is or should be highly valued and protected by our future society and help perpetuate the human race.<sup>66</sup>

"I believe that my previous discussion<sup>67</sup> demonstrates the compelling social interests that have a secular foundation warranting a prohibition against abortions. I elaborate here my point that fetuses, like infants and older children, have the potential for developing rational judgments.<sup>68</sup> Fetuses, infants, children, and adults all participate in the process of 'becoming.'<sup>69</sup> The more closely we look at how each of these human entities will advance to the next stage of human development, the more real and the less abstract becomes the interest of the fetus.<sup>70</sup> While there is some

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<sup>66</sup> Professor Greenawalt suggests that one reason why newborn babies and "late" fetuses are "thought to have so much value is because of what almost all of them will become." Greenawalt, *supra* note 8, at 376. While I generally agree with the point made by Professor Greenawalt that potential capacity counts as do present and past characteristics, I disagree with his use of the word "late" to modify fetus if the modification implies a restriction to only certain fetuses who have presumably matured to a particular stage in their development. In most cases, any fetus will become what "late" fetuses will become, future members of society.

<sup>67</sup> See *supra* note 65 and accompanying text.

<sup>68</sup> Professor Patricia A. King has thoughtfully examined the legal issues concerning the competing rights between pregnant women and the fetuses they carry. King, *The Judicial Status of the Fetus: A Proposal for Legal Protection of the Unborn*, 77 MICH. L. REV. 1647 (1979). I have some fundamental disagreements with her thesis in which she would afford different levels of protection to fetuses depending on whether they are viable or not, i.e., capable of independent existence, outside of the womb. I would generally agree with her, but not with her qualifications, that the law should recognize the obligation to protect fetal interests in life. Professor King argues that, because fetuses will develop into rational adults someday, society must afford them protection to ensure this development. In her estimation, it is immaterial to argue that, unlike children, fetuses are incapable of interacting with other human beings (with the probable exception of the mother). King believes that the pre-viable fetus, like the viable one, is entitled to some level of protection. *Id.* at 1649, 1673. For King, the viability criterion represents a fair balance between competing interests of developing (fetus) and mature (mother) human beings. *Id.* at 1682-83. As King states, "[t]he interests of the mother and the viable fetus should be weighed equally in resolving conflicts between them." *Id.* at 1683.

<sup>69</sup> Judge John T. Noonan, Jr. illustrates how all human existence, including that belonging to fetuses, is a process of becoming. He states that "[a]ll human life, whether fetal, infant, adolescent, mature, or aged, is in the process of becoming." J. NOONAN, *THE MORALITY OF ABORTION: LEGAL AND HISTORICAL PERSPECTIVES* 258 (1970).

<sup>70</sup> According to Judge Noonan, the interest of the fetus in further development is not an abstraction, it is a reality. J. NOONAN, *supra* note 69, at xvii. I construe the distinction between abstraction and reality to mean that the potential development and future life of the fetus is not hypothetical. It is something which is predictable and will eventually occur if the ordinary process of fetal development is allowed to evolve naturally and without intentional interference by another human being. In this sense, the fetus's future is real and not abstract.

disagreement on how much alike the different levels of human development are, there is no doubt that each level will naturally evolve into the next one in ordinary course of events."<sup>71</sup>

#### CLAIMS FOR ABORTION BASED ON HARD CASES

"All right, Thelma, but you cannot deny that all claims to abortion are alike. I know you have read my amicus brief wherein I examine a number of distinct issues: (1) the pregnancy is due to some impermissible, nonconsensual sexual relation such as rape or incest; (2) the carrying of the fetus to full term would endanger the life of the mother; (3) the fetus is diagnosed as having some significant and substantial health problem which threatens the quality of life the fetus would have once it is born; and, finally (4) the socio-economic situation of the mother is such that having to raise the child with which she is pregnant will place exceptional burdens on her and will, in all likelihood, condemn her to a life of poverty. Her ensuing poverty would adversely affect the nutrition of the child and probably limit the educational and employment opportunities of the child."

"I realize, Jarvis, that each of these situations which you identify and discuss presents a difficult human tragedy. None is a simple matter to be dismissed lightly. However, the secular-based natural law theory I am advocating contends that notwithstanding these difficult circumstances, the fetus's interests should prevail over the woman's and that the woman has no rightful claim to an abortion because: (1) the fetus, as the first stage of human development,<sup>72</sup> commences the process in which a unique and identifiable individual enters the human race; (2) the fetus is an innocent who warrants the protection of society; (3) it is wrong to terminate intentionally the existence of an innocent; and (4) it is therefore wrong to ter-

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<sup>71</sup> See *supra* note 68.

<sup>72</sup> The term "development" means that each human being progresses through stages of development that begin with the fertilized egg that creates a unique genetic material different from that of the male sperm and female ovum and continue through a multitude of stages after birth. Fertilization begins the process of ontogenesis, the development of a unique human being different from the mother and father. As Doctor Blechschmidt asserts:

a human being does not *become* a human being but rather *is* such from the instant of fertilization. During the entire ontogenesis, no single break can be demonstrated, either in the sense of a leap from the lifeless to the live, or of a transition from the vegetative to the instinctive or to characteristically human behavior. It may be considered today a fundamental law of human ontogenesis that not only human specificity but also the individual specificity of each human being remains preserved from fertilization to death, and that only the appearance of the individual being changes in the course of ontogenesis.

E. BLECHSCHMIDT, HUMAN BEING FROM THE VERY FIRST: NEW PERSPECTIVES ON HUMAN ABORTION 7-8 (1981).

minate a pregnancy by aborting a fetus.

"I begin addressing your points by recapping several points previously made. The end of the species is to flourish, and to do so, the individual members of the human race are inclined to preserve themselves. It seems that the procreation of life and the need and desirability to preserve the self, which in turn, preserves the species, are interrelated principles that are consistent with and complement one another.<sup>73</sup> In order for the human race to continue, it is essential that the development of human life be fostered rather than inhibited.

"Ultimately, every fetus that is not interfered with by the pregnant woman, or some third party, will share either the same or similar interests and goals concerning the preservation and ends of the individual and the species. A fetus is an identifiable individual who combines genetic material donated by a male and a female and makes a synthesis unique to the fetus. If allowed to develop, each and every fetus will continue into the further development of a unique human being. A fetus is not something other than a human being: it is a human being at that person's earliest stage of formation. If allowed to evolve, it will share a development every person experiences who progresses through birth, infancy, childhood, adolescence, and adulthood.<sup>74</sup> As the process of human development continues, each person can individually and collectively look back to see how his or her personal development is inextricably related to individual flourishing and the flourishing of society."<sup>75</sup>

#### THE FETUS IS AN INNOCENT MERITING SOCIETY'S PROTECTION

"We should start off in addressing your difficult issues, Jarvis, by determining whether a fetus is an innocent who merits society's protection. Since a developing fetus has not had any opportunity to act intentionally in any way whatsoever, it cannot be in a position to harm another intentionally, particularly the mother who bears the fetus. The fetus must be deemed innocent because, at this level of human development, it is incapable of intending harm to anyone. In the absence of the capacity to intend to harm another, the fetus must be considered an innocent."

"Well, assume that a child, who is otherwise an innocent, is carrying a bomb toward a group of people that cannot be removed from the area. Would these people, in self-defense, be justified to shoot and kill the child in order to protect this group of people?"

"No, Jarvis, the doctrine of proportional self-defense against an innocent, upon which I shall elaborate in a moment, could not justify killing

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<sup>73</sup> See *supra* note 58.

<sup>74</sup> See A. MACINTYRE, *supra* note 39, at 7.

<sup>75</sup> See J. FINNIS, *supra* note 24, at 124.

the child to save the others. Of course, this would not prevent the group from taking some action to stop the child; however, killing the child to stop it would be out of the question.<sup>76</sup>

"Since a fetus is an innocent, it would be wrong to terminate the development of a fetus because it is incapable of intentionally harming another human entity. Following this reasoning, it would be wrong for society to consent to the termination of the pregnancy by aborting the innocent fetus. Since it would be generally impermissible for society to take any action against the innocent fetus, I would now like to address the first of the issues you raise, Jarvis: can a woman terminate the pregnancy which endangers her own health?"

#### THE FETUS AND A MEDICAL DANGER TO THE MOTHER

"To look at the broadest scope of this issue, I think we must assume that this type of pregnancy may not only endanger the health, but also the survival of the woman. Terminating the pregnancy might be construed as an act of self-defense taken by the mother against the fetus. We can also assume that the woman, like the fetus, is an innocent.

"We begin then with two entities who are at different points in the chain of human development and who share the status of innocents. Now, is it permissible for one innocent, namely the woman, in an act of self-defense, to terminate the existence of the second innocent, the fetus? Remember, under my proposal for a secular-based natural law, an innocent may take certain, proportional measures<sup>77</sup> that are reasonably necessary to defend one's existence. A redefinition of the question, then, is whether the woman can terminate the pregnancy which threatens her own life by prejudicially terminating the development and growth of the fetus?

"I acknowledge that the woman, under narrowly appropriate circumstances, may be able to exercise deadly force against her assailant who intends to do her great bodily harm that a reasonable person would conclude could result in her death.<sup>78</sup> However, in a pregnancy, the fetus is incapable of taking the same kind of action against the mother as the assailant. The woman's response to the threat posed by the pregnancy must be proportional to the intention of the entity posing the danger. She may take those medical steps necessary to protect her personal, physical welfare, but she is precluded from taking any steps, including abortion, which would prolong her own life but threaten the fetus's integrity. Such

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<sup>76</sup> It might be permissible to wound the child or stun it to prevent it from advancing with the bomb. If this were done, however, there might be some duty to render assistance to the child to save it from the bomb. See *infra* note 79.

<sup>77</sup> See *supra* notes 59-62 and accompanying text.

<sup>78</sup> *Id.*

steps would be disproportional. While the woman is entitled to take those steps necessary to defend herself from danger, she may not take the life of the fetus to preserve her own."

"But isn't the fetus essentially like the assailant against whom a person might be able to take deadly force in self-defense?"

"No. Whereas the assailant intends to harm another, the fetus does not. My conception of secular natural law<sup>79</sup> would preclude the woman from defending her interest by threatening the physical integrity of another innocent entity with whom she shares the chain of human development.<sup>80</sup> The fetus's presence is not equivalent to the attack of the assailant even though the life of another is at stake. The assailant intends to harm, the fetus does not. In essence, intent is an important element in my theory of proportional defense. While they may unknowingly pose life-endangering threats, innocents, unlike assailants, do not intend to threaten. Because of this crucial distinction, innocents, *e.g.*, fetuses, cannot be defended against by deadly force.

#### THE PREGNANCY RESULTING FROM NONCONSENSUAL SEXUAL RELATIONS

"I now tackle your next difficult case, that involving a pregnancy resulting from nonconsensual sexual relations such as rape or incest.<sup>81</sup> Again, I think it important to portray this kind of pregnancy from the perspective of the woman who did not consent to the intercourse responsible for the pregnancy. In this situation, the woman is again an innocent victim of a violent crime: she has been violated and abused against her will. She did not intend to have the intercourse which produced her pregnancy. However, once the fetus produced by this intercourse enters the chain of human development, the woman is not the only innocent whose interest is at stake. Again, presupposing the biological progress of the fetus through the earliest stages of human development, there is a second entity who shares with the woman the interest of self-preservation and further development.<sup>82</sup>

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<sup>79</sup> This might be termed a principal directive of secular natural law. Preservation rather than elimination of life is essential to protecting one's self. However, there is a progression in the level of harm in the exercise of proportional self-defense: "Where damage is inevitable, it is reasonable to prefer stunning to wounding, wounding to maiming, maiming to death: i.e. lesser rather than greater damage to one-and-the-same basic good in one-and-the-same instantiation." J. FINNIS, *supra* note 24, at 111.

<sup>80</sup> See, *supra* note 51.

<sup>81</sup> Incest can occur between consenting adults. For example, in New York incest is defined without reference to force, the only consideration being the scienter that you are related. See N.Y. PENAL LAW § 255.25 (McKinney 1977). However, I include it as a nonconsensual sexual relation because it often occurs between an adult male and a younger female who often is in no position to consent to such physical abuse.

<sup>82</sup> It appears that the number of abortions caused by nonconsensual sexual relations is small

"The next element to be addressed in the question of a pregnancy due to nonconsensual sexual relations is whether the victimized woman has any supervening right to terminate this type of pregnancy? Again, it would seem that the woman might have a self-defense argument to the nonconsensual pregnancy. She can take whatever proportional means are necessary to ward off her attacker and to preserve and protect her physical welfare from invasion.<sup>83</sup> It might even be arguable that the steps taken against the attacker could, under certain well-defined circumstances, include deadly force.<sup>84</sup>

"However, the proportional steps she could take in self-defense against the innocent fetus are dramatically different both in quality and degree. Again, there is the interest of an innocent woman pitted against that of an innocent fetus. Both have similar if not the same interest in self-preservation and further human development. Essentially, then, the woman's ability to defend herself is curtailed when the focus of the defense shifts from the perpetrator of the nonconsensual sexual relations to the innocent fetus. Whatever steps the woman has against the fetus must be proportional. Since the fetus is also an innocent, the doctrine of proportionality would not justify the woman in taking the drastic step of terminating the fetus. Such action would be disproportionate and would therefore be impermissible on this ground. It would also be impermissible on the additional ground that one innocent in the chain of human development, in this case, the woman, cannot take any action that threatens the physical integrity and subsequent development of another innocent in the chain of human development, the fetus. The interests of one innocent cannot supersede those of another innocent."

#### A MEDICAL DEFICIENCY IS DIAGNOSED PRIOR TO BIRTH

"The third difficult case you present is that in which the fetus is diagnosed as having its own significant and substantial health problem or deficiency which may reflect on the quality of its subsequent human development.<sup>85</sup> I assume that the health problems you have in mind, Jarvis, would include serious medical conditions such as physical deformity,

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when compared with abortions brought about through consensual sexual relations. According to the 1987 study conducted by the Alan Guttmacher Institute, approximately one percent of abortions in the United States terminated pregnancies caused by rape or incest. Lewin, *Rape and Incest: Just 1% of all Abortions*, N.Y. Times, Oct. 13, 1989, at A17, col. 1.

<sup>83</sup> See West, *supra* note 51, at 66, 70 (feminist discussion about physical and legal invasion of woman's interest prompted by pregnancy).

<sup>84</sup> See *supra* note 61.

<sup>85</sup> By deficiency, I mean some physical defect or mental handicap which interferes with the person's achieving stages of development normally expected to be attained by the average person under like or similar circumstances.

mental retardation,<sup>86</sup> or some other significant condition which will adversely affect the quality of human life subsequent to birth. Termination of the development of the fetus who is adversely affected by one of these medical conditions for the sake of the fetus is analogous to suicide of someone who has progressed further along the chain of human development and who is capable of intentionally ending further development by committing suicide.<sup>87</sup>

"Premature termination, *i.e.*, euthanasia, of a human entity's existence for its 'own good' is sufficiently analogous to suicide.<sup>88</sup> Termination of the fetus's development 'for its own good,' like suicide, and euthanasia, is invalid and impermissible within my secular natural law theory for two reasons.

"The first reason concerns the fact that human entities naturally take whatever action they can to protect themselves from harm and to preserve their future development. It is natural for human entities to develop and flourish to the highest stage possible and for the longest duration of time. To terminate prematurely this development, without taking any steps whatsoever to preserve and protect its future, directly conflicts with the principles of human development in which every person has a personal interest, and which interest is shared by every other person regarding his or her own development.<sup>89</sup> Just as suicide conflicts with these principles, so too would the termination of this kind of pregnancy in order to prevent the fetus from living a handicapped existence in the future.<sup>90</sup>

<sup>86</sup> Professor King argues that to the extent that those born with mental defects are curable of these conditions, they have "rights." She presumably means those rights which a person of like or similar circumstances would enjoy if he or she did not have such defects. However, Professor King further asserts that to the extent that such a person is not curable of such defects, she is "inclined" to think that these individuals do not have rights. She does hasten to add that the incurable is not to be treated "cavalierly." King, *supra* note 68, at 1669 n.109. It seems that Professor King's position could lead to a rationalization for euthanasia which I condemn. See *infra* note 87.

<sup>87</sup> Without further elaboration or explication, Professor King states that defective fetuses should be treated in the same way as defective newborns. She believes that the problem of the defective viable fetus, like that of the defective newborn, is not an issue simply of protecting fetuses, it is one which raises the issue of euthanasia. King, *supra* note 68, at 1686. She does not explain her position toward the pre-viable fetus who is diagnosed as having similar incurable defects.

<sup>88</sup> I would conclude that euthanasia is like suicide. In both instances, a life is knowingly taken to avoid some consequence or potential consequence to that same life. See *supra* notes 63-64 and accompanying text.

<sup>89</sup> This is akin to the interest of self-respect which Rawls identifies and addresses. See *supra* note 55.

<sup>90</sup> Aquinas states that "[t]o bring death upon oneself in order to escape the other afflictions of this life is to adopt a greater evil in order to avoid a lesser." 2 T. AQUINAS, *supra* note 27, at II-II, question 64, art. 5.

"The second reason militating against termination of this type of pregnancy is that the fetus has a distinct, albeit future, position in human society. Our law currently does not permit a severely handicapped human from being intentionally destroyed because his or her future participation in society is clouded by the handicap. Put simply, neither suicide nor euthanasia are condoned by our society. Similarly, it would be impermissible to terminate the existence of the fetus who will continue its handicapped status after birth."

#### SOCIO-ECONOMIC CONSIDERATIONS AND ABORTION

"The final difficult case you present is that in which the socio-economic conditions of the mother would be adversely affected if she were required to have and raise this child. The tragedy portrayed here has little to do with the propriety or impropriety of the future of the developing fetus. It has much to do with the ability or inability of our society to treat its current and future members in a humane way that guarantees all members of the human race those essentials of a productive human life.<sup>91</sup> Suggesting that termination of a developing human being is an answer to this problem is a mistake. The problem is not the developing human being, the problem, rather, is the system of distribution of essential goods and services. The solution to the problem is not the taking of life. Rather, the solution is making available that which life needs, the essential goods and services which cultivate productive lives and promote human flourishing. Providing for the needs of human beings is simply not a calculation made in a utilitarian calculus. It is, as Professor Finnis suggests, acknowledging that '[t]he common good is the good of individuals living together and depending upon one another in ways that favour the well-being of each.'<sup>92</sup>

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<sup>91</sup> See *supra* note 47. Some critics of anti-abortion advocates suggest that the latter might only be concerned about protecting fetuses and make no provisions for supporting a child once it is born. Since I have argued that individuals and society have a duty to protect the fetus, they have a correlative duty to support the child in such a way that fosters the development of life and the other basic human goods once the child is born. See *supra* note 48; see also Greenawalt, *supra* note 8, at 383 ("The idea that the state simply has no responsibility to care for those who would lack food and shelter if left to private ordering is in tension with ordinary moral standards concerning reciprocal support and the state's unique capacity to coordinate.")

<sup>92</sup> J. FINNIS, *supra* note 24, at 305; A. MACINTYRE, *supra* note 39, at 156. In a similar fashion, John Rawls suggests that people agree upon forms of social cooperation to further their own individual interests which, in turn, seems to further the interests of others. J. RAWLS, *supra* note 53, at 15-16.



## CONCLUSION

"Well, Thelma, I must say that you have presented an interesting elaboration of your natural law theory. However, I have to point out to you a strong, fundamental disagreement with what you have said. It's no secret that my client's pro-choice position is inextricably related to the fundamental right and liberty to choose one's own destiny, including control over a woman's body, without interference from the state or the rest of society."<sup>93</sup>

"I think I understand your position, Jarvis. However, even John Stuart Mill acknowledged that when a self-regarding act adversely affects another, the act is removed from 'the province of liberty and placed in that of morality or law.'<sup>94</sup>

"Our individual and societal interests in protecting individuals is something which I have attempted to show is protected by common interests and secular objectives of protecting not only our individual lives but the lives of present and future generations. While I recognize the general rights of your clients, it is important that they similarly recognize those held by other human interests, including the human interests of future generations. Moreover, it is important for our judges, including members of the Supreme Court, to recognize that hard cases like the one we are involved with require all involved to confront the 'issues as a matter of principle [as the] law of integrity demands.'<sup>95</sup>

"When we care for our own individual rights, we must also care for the rights of others. A natural law that serves secular objectives recognizes the importance of mutuality and reciprocity.<sup>96</sup> This is a point which even contractualists like Rawls, who are most interested in preserving the rights of the self, acknowledge.<sup>97</sup> Otherwise, Jarvis, I fear that we will become a society of individuals concerned only with preserving self-interests. This is fine until the rights of one begin to conflict with those of others. I fear for ourselves and our civilization when we plunge into pre-

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<sup>93</sup> J.S. MILL, *ON LIBERTY* 68 (G. Himmelfarb ed. 1985) (1859). Although H. L. A. Hart believes that there may be grounds for justifying legal coercion of people other than preventing harm to others, Hart generally agrees with Mill in the area of morality, and possibly, in a more narrow sense, sexual morality. H.L.A. HART, *LAW, LIBERTY, AND MORALITY* 5 (1963).

<sup>94</sup> J.S. MILL, *supra* note 93, at 149.

<sup>95</sup> R. DWORKIN, *supra* note 25, at 258. Professor Dworkin continues his discussion by stating that "[i]ntegrity is distinct from justice and fairness, but is bound to them in this way: integrity makes no sense except among people who want fairness and justice as well." *Id.* at 263. For an interesting and informative elaboration of the protection of all individual rights in a system that attempts to achieve fairness within justice, see Hart, *Are There any Natural Rights*, 64 *PHIL. REV.* 175 (1955), reprinted in *POLITICAL PHILOSOPHY* 56 (Quinton ed. 1967).

<sup>96</sup> J. FINNIS, *supra* note 24, at 123.

<sup>97</sup> See *supra* note 55.

serving self-interests without considering the other, including the fetus. The attitude of individualism-at-any-cost above all else breeds an insensitivity that can lead to unjust, unfair, and undesirable conclusions that may be tolerated by the law-as-it-is but not by the law-as-it-ought-to-be.<sup>98</sup>

"While the example comes from American fiction, I think it suitably describes this insensitivity bred by super-individualism. The story is related by H. L. A. Hart: 'Huckleberry Finn, when asked if the explosion of a steamboat boiler had hurt anyone, replied, "No'm: killed a nigger." Aunt Sally's comment "Well it's lucky because sometimes people do get hurt" sums up a whole morality which has often prevailed among [people].'<sup>99</sup> Hart continues by stating that:

Where it does prevail, as Huck found to his cost, to extend to slaves the concern for others which is natural between members of the dominant group may well be looked on as a grave moral offence, bringing with it all the sequelae of moral guilt. Nazi Germany and South Africa offer parallels unpleasantly near to us in time.<sup>100</sup>

"Sadly, this sentiment about which Hart ponders likewise existed in our own national history. The fiction of Samuel Clemens was indeed a commentary on the reality of our country's peculiar institution which discriminated against a group of people because they had dark skin.<sup>101</sup> Fortunately, our country was able to eliminate itself of this abhorrent institution even though its progeny of discrimination still remains in many areas of our society. Regrettably, a newer peculiar institution, abortion, still threatens another group and prejudices them by their status of being unborn."

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At that moment, the train lurched forward, the main lighting returned, and fresh air began to pour through the ventilation system. The conductor announced that full power and operating ability had just been restored and the train would be proceeding momentarily. Thelma and Jarvis unconsciously returned to their work as the train began to move.

As one who had sat nearby in the same car with Thelma and Jarvis, I began to think about what I had heard and what it might have meant to each one of us before we were born and what it might mean to all future generations. Smiling to myself, I paraphrased Blanche BuBois.<sup>102</sup>

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<sup>98</sup> See *supra* note 43.

<sup>99</sup> H.L.A. HART, *supra* note 26, at 196.

<sup>100</sup> *Id.*

<sup>101</sup> See *supra* note 43.

<sup>102</sup> Blanche DuBois is the character in Tennessee Williams' play *A Streetcar Named Desire*

Somehow, what Thelma had said made sense. I wondered if it would make sense to those who would hear her later on this day?

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who, when asked if she is lost, replies: "They told me to take a street-car named Desire." T. WILLIAMS, *A STREETCAR NAMED DESIRE* act I, scene 1 (1948).